

STATE OF MICHIGAN  
COURT OF APPEALS

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DEBRA K. BLANKENSHIP and EDMUND LEE  
HAYES, Individually and as Co-Personal  
Representatives of the ESTATE OF BRENT LEE  
HAYES, deceased,

Plaintiffs-Appellees,

V

ARTHUR RANDY ANDREWS, WAYNE  
COUNTY ROAD COMMISSION, and RSKCO  
SERVICES, INC,

Defendants,

and

COUNTY OF WAYNE,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2004

No. 248866  
Wayne Circuit Court  
LC No. 01-121723-NI

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant Wayne County appeals as of right the order denying its motion for summary disposition on governmental immunity grounds.<sup>1</sup> We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs' decedent was killed while working on a road patching crew while employed by defendant. The decedent was struck by the trailing "shadow" vehicle that was part of the rolling

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<sup>1</sup> The individual defendant, Arthur Andrews, did not appeal from the trial court's order, thus the question of employee immunity is not before the Court. Defendant indicated that Andrews did file a delayed application for leave to appeal; however, this Court denied the application. *Blankenship v Andrews*, unpublished order of the Court of Appeals, entered June 2, 2004 (Docket No. 253231).

patch crew in which he was working. The incident occurred when the shadow vehicle driver, defendant Andrews, momentarily turned his head at the same time the lead vehicle stopped. Because of the short distance between the lead and shadow vehicles, the decedent was crushed.

Plaintiffs brought this action asserting that the death arose from an intentional tort, not subject to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131. Plaintiffs asserted that they avoided governmental immunity through the motor vehicle exception, MCL 691.1405. Defendant argued that (1) plaintiffs could not establish the existence of an intentional tort under the WDCA, and (2) even if plaintiffs could establish an intentional tort in order to avoid the exclusive remedy of the WDCA, it would still be immune because there is no intentional tort exception to governmental immunity, citing *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987). The trial court denied defendant's motion for summary disposition, and defendant filed a claim of appeal pursuant to MCR 7.202(7)(a)(v).

We review de novo the denial of a motion for summary disposition decided under MCR 2.116(C)(7), as well as the issue of whether the defendant is entitled to statutory governmental immunity. *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004). In this case, rather than determining whether *Smith* precludes application of the WDCA intentional tort exception against a governmental entity,<sup>2</sup> we instead conclude that there is no genuine issue of material fact that plaintiffs could not establish the existence of an intentional tort. This issue is also reviewed de novo. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000).<sup>3</sup>

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), the Supreme Court outlined what proofs are necessary for a case to fall within the intentional tort exception<sup>4</sup> to the exclusive remedy provision of the WDCA:

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<sup>2</sup> Although defendant's brief submitted to the trial court and this Court addressed the applicability of *Smith*, it did not cite to this Court's decision in *Madison v Detroit*, 208 Mich App 356; 527 NW2d 71 (1995), rev'd on other grounds, 450 Mich 976; 547 NW2d 653 (1996), which did address the issue. Plaintiffs' brief neither addresses nor even cites to *Smith*. Moreover, both parties' briefs treat as the main issue on appeal to be whether an intentional tort was established.

<sup>3</sup> Although the trial court denied defendant's motion, premised in part on governmental immunity, the applicability of the WDCA to this case is not resolved by application of governmental immunity. However, plaintiffs concurred with defendant's statement of jurisdiction, and focused much of their appellate argument on whether there were sufficient facts to create a jury submissible issue on the intentional tort exception to the exclusive remedy provision of the WDCA. We therefore reach this issue by treating the claim of appeal as an application for leave to appeal, which we grant. *Newton v Michigan State Police*, 263 Mich App 251, 259; 688 NW2d 94 (2004).

<sup>4</sup> The intentional tort exception is contained within MCL 418.131(1), and provides as follows:

The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or  
(continued...)

If we read both sentences of the intentional tort exception together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id.* at 180 (Boyle, J.).]

Plaintiffs here rely upon the second method of proving an intentional tort under *Travis*, that being use of circumstantial evidence when there is no direct evidence of an intent to injure. As we stated in *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997), plaintiff must prove the following:

(1) "Actual Knowledge" – This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing that a supervisory or managerial employee had "actual knowledge that an injury would follow from what the employer deliberately did or did not do."

(2) "Injury certain to occur" – This element establishes an "extremely high standard" of proof that cannot be met by reliance on the laws of probability, that mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.

(3) "Willfully disregard" – This element requires proof that an employer's act or failure to act must be more than mere negligence, e.g., failing to protect someone from a foreseeable harm. Instead, an employer must, in fact, disregard actual knowledge that an injury is *certain* to occur. [Emphasis in original.]

In this case, after consideration of the evidence in a light most favorable to plaintiffs, we conclude that plaintiffs failed to establish that defendant committed an intentional tort against plaintiffs' decedent. Plaintiffs' theory was that defendant had promulgated safety rules that required the distance between the shadow vehicle and the working crew to be approximately one

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(...continued)

occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under the law.

hundred feet, but had failed to train the employees and enforce the rules with road crews. Defendant's failure to enforce its own rules, which plaintiffs claim had obvious dangerous consequences, caused decedent's death and was an intentional tort under a properly interpreted WDCA.

However, there is no evidence to suggest, as required by *Travis*, that defendant deliberately disregarded actual knowledge that an injury was certain to occur. *Travis, supra* at 180; *Palazzola, supra* at 150. The fact that defendant's supervisors knew that defendant's safety guidelines were not being provided to workers does not create a willful disregard of actual knowledge that an injury is certain to occur. Indeed, what plaintiffs are alleging, and the evidence suggests occurred, is that the decedent was injured because defendant failed to properly train its employees regarding defendant's own guidelines, and the guidelines pertain to a normally dangerous condition. This type of evidence suggests that defendant failed to protect the decedent from a foreseeable harm, and failed to properly train its employees, both of which are insufficient as a matter of law to establish an intentional tort. *Palazzolo, supra*.

Moreover, the undisputed evidence also established that there had been no prior incidents similar to what occurred to the decedent, and there was no evidence that defendant was warned that if these employees continued as they were, injury was certain to occur.<sup>5</sup> In sum, there is simply no evidence that defendant was aware that an injury was certain to occur because of the crew procedures, or that it deliberately disregarded any such information that resulted in the injury.<sup>6</sup>

Reversed and remanded for entry of an order granting defendant's motion for summary disposition.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ Michael R. Smolenski

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<sup>5</sup> Of course, defendant realized rolling patching work was dangerous, as it promulgated safety guidelines for the crews. However, mere promulgation of safety standards does not constitute actual knowledge that an injury is certain to occur.

<sup>6</sup> Both parties cite to events or evidence regarding matters occurring after the accident. However, we conclude that such evidence is not material to the issue of defendant's knowledge and intent before the accident occurred.